Petition

NO. 81-1825

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KENNETH JAMES CROSSMAN and
GERALD REED PIERCE,

Petitioners,

versus

THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If a law enforcement agent of the United States Government, acting in an undercover capacity, approaches a United States citizen and offers to sell him a number of machine guns, agrees with the citizen as to the price for the sale, exhibits a number of machine guns (which are the property and in the possession of the United States Government) to the citizen and a confederate and then arrests both individuals and charges them with conspiracy to possess an unregistered firearm, does this constitute governmental conduct which is so outrageous as to violate due process and give rise to a viable defensive issue in and of itself without reference to the law of entrapment?

2. a. Where an attorney is engaged to represent two codefendants and advises one of them, who wishes to take the stand in his own defense, not to do so because he might incriminate himself, but also because he would certainly incriminate the codefendant, has an actual conflict of interest proscribed by the Sixth Amendment occurred?

b. Where a trial court perceives a conflict of interest because of dual representation and conducts an in chambers examination of two codefendants in order to determine voluntariness of their waiver of a Sixth Amendment right to conflict free counsel, but such examination fails to reach the threshhold expressly set by United States Circuit Court of Appeals having appellate jurisdiction over the actions of that trial court, may a valid waiver of a constitutional right in this area nonetheless be affected?

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KENNETH JAMES CROSSMAN and
GERALD REED PIERCE,
Petitioners,

V.

THE UNITED STATES OF AMERICA,
Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

KENNETH JAMES CROSSMAN and GERALD REED PIERCE, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the case of United States of America, Plaintiff-Appellee, v. Kenneth James Crossman and Gerald Reed Pierce, Defendants-Appellants, No. 81-1120, Summary Calendar, rendered on December 11, 1981, petition for rehearing and suggestion for rehearing en banc denied February 25, 1982.

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OPINION BELOW

The United States Court of Appeals for the Fifth Circuit entitled United States of America, Plaintiff-Appellee, v. Kenneth James Crossman and Gerald Reed Pierce, Defendants-Appellants, No. 81-1120, Summary Calendar, affirmed the judgment of the trial court on December 11, 1981. Such opinion is, as of the date of preparation of this petition, as yet unreported. A copy of such opinion is included in the appendix. The petition for panel rehearing and suggestion for rehearing en banc was denied per curiam on February 25, 1982, and a copy of such order appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit is contained in its opinion rendered on December 11, 1981, and a per curiam order denying a petition for panel rehearing and a suggestion for rehearing en banc was entered on February 25, 1982. Jurisdiction is conferred on this Honorable Court by 28 U.S.C.A. 1254(1) providing for review by writ of certiorari upon petition of any party to a criminal case.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves, with respect to the first questions presented, the provision of the Fifth Amendment to the Constitution of the United States which provides, in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law: . . .

With respect to the second question presented, the case involves the provision of the Sixth Amendment to the United

States Constitution which provides in part:

> In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A grand jury indictment filed on October 21, 1980, in the United States District Court for the Western District of Texas, El Paso Division, charged the Petitioners Kenneth James Crossman and Gerald Reed Pierce with conspiring to receive and possess unregistered firearms in violation of 18 U.S.C. 371 and 26 U.S.C. 5861(b). The indictment contained one count. A jury found Appellants guilty as charged and they were sentenced to four years imprisonment. A motion for new trial raising essentially the questions presented here and to the Fifth Circuit Court of Appeals was filed and overruled by the trial court. Appeal was taken to the United States Court of Appeals for the Fifth Circuit and Petitioners' conviction was affirmed on December 11, 1981. A petition for rehearing and a suggestion for rehearing en banc was timely filed and denied per curiam on February 25, 1982. An application for stay of the mandate was filed with the Clerk of the Fifth Circuit on or about March 3, 1982. Counsel has not been notified as to the disposition of this application as of the time of drafting of this petition.

On September 10, 1980, an undercover drug enforcement administration agent was introduced to Petitioner Crossman in Albuquerque, New Mexico. The agent was posing as a dealer in guns and entered into a negotiation with Crossman concerning the purchase of a number of machine guns and other items not relevant to this case. Crossman subsequently contacted Petitioner Pierce in El Paso, Texas, and succeeded in interesting him in the transaction. On September 22, 1980,

an agent of the Alcohol, Tobacco and Firearms Bureau, Department of the Treasury, was brought into the situation, undercover, and contacted Petitioner Crossman in El Paso, Texas. On or about September 23, 1980, another agent exhibited a number of machine guns to Petitioners. Later that evening Petitioner Pierce handed the agent $5,000.00 which was then returned to him. The parties proceeded to the parking lot of an El Paso motel. Petitioner Pierce opened the trunk of his car prepratory to receiving delivery of the weapons. At this point agents moved in and arrested Pierce and Crossman. During the course of the negotiations proceeding the arrest, the Alcohol, Tobacco and Firearms agent dealing with Petitioners in El Paso stated to Petitioner Crossman on five occasions, that he (Crossman) was doing nothing wrong.

Petitioners retained an El Paso, Texas attorney to represent both of them in a trial of the cause. Prior to the trial, apparently concerned about a conflict of interest problem inherent in joint representation, the trial judge called counsel and Petitioners into his chambers. The Court advised Petitioners that they had the right to have just one lawyer because it might develop some time during the course of the trial that one of them might have a defense and the other one might not have a defense as to a particular matter. He further advised that there might be a conflict of interest insofar as their attorney was concerned. The Court then asked them two questions, being whether they had addressed the possible conflict with their attorney followed by a query as to whether they had gone over this with their lawyer and wished Mr. Ramos to represent both of them. Petitioners answered affirmatively and Mr. Ramos then executed a written statement, previously prepared by the Court, to the effect that he could see no conflict of interest. Petitioners were required to affix their names to Mr. Ramos's statement by the Court and the cause proceeded to trial. Subsequent to their conviction, Appellants retained a new counsel on appeal and filed a motion for new trial based upon conflict

of interest on the part of their trial attorney and what was then characterized by appellate counsel as an "entrapment" issue. The Court overruled the motion for new trial but allowed appellate counsel to present evidence perfecting his bill. Each Petitioner testified that he had discussed the conflict of interest issue with trial counsel, that he was not aware of any specific conflict of interest and that he was advised by trial counsel that he could see none. Each Petitioner further testified that he became aware of a conflict of interest when he retained a different counsel on appeal. Trial counsel was then called to the stand and testified that despite Petitioner Crossman's desire to take the stand, he refused to allow him to do so because he feared that Petitioner Crossman would incriminate himself and would also incriminate Pierce.

Subsequently, Petitioners were sentenced to four year terms of confinement by the trial court and the appellate process was begun.

REASONS FOR GRANTING THE WRIT

1. With respect to the first question presented, involving outrageous governmental conduct as a defensive issue, the writ should be granted because the United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with a decision of the United States Court of Appeals for the Third Circuit, in conflict with applicable decisions of the Supreme Court and in conflict with other Fifth Circuit Panel Decisions.

The Fifth Circuit opinion, in the section entitled "Entrapment" (p. 294) is contrary to the opinion of this Court in *United States v. Russell,* 93 S. Ct. 1637 (1973). The Fifth Circuit states:

> Crossman and Pierce also assert that "out-

> rageous conduct" by the government should afford them the entrapment defense. Even if the government's actions rose to such a level, the Supreme Court in *Russell* considered and explicitly rejected this argument.

Quite the contrary is true. The Court in *Russell* holds that where predisposition is admitted, entrapment cannot occur, but (p. 1643, hdnte 1) recognizes that there is a defense distinct and apart from entrapment and characterizes that defense as follows:

> While we may be some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . .the instant case is distinctly not of that breed.

This Court further characterizes what will be hereinafter referred to as the outrageous conduct defense as one which violates:

> that "fundamental fairness" shocking to the universal sense of justice," mandated by the due process clause of the Fifth Amendment.

This Court further states since the defense of "entrapment" is not of a *constitutional dimension* (emphasis supplied)
Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable. (p. 1643).

Thus this Court in *Russell*, supra, far from rejecting the outrageous conduct defense, explicitly recognizes it, dis-

tinguishes it from entrapment and holds that such a defense is one of constitutional dimension while entrapment is not.

The Fifth Circuit in this case relied exclusively upon the law of entrapment for affirmance.

On original submission to the circuit court, Petitioners urged this constitutional defense separately from the entrapment issue, although both were combined for convenience in one section of their brief. A different panel of the circuit court did much the same thing in *United States v. Lentz*, 624 F.2d 1280 (1980), treating these same two issues in a section entitled "Entrapment and Due Process." *Lentz*, supra, is significant in that it recognizes the outrageous conduct defense as one quite apart from entrapment and notes that five members of this Court in *Hampton v. United States*, 96 S.Ct. 1646 (1976) have also recognized it. There, this Court stated:

> This does not mean, however, that the defense of entrapment necessarily is the only doctrine relevant to cases in which the government has encouraged or otherwise acted in concert with the defendant.

The *Lentz* panel then concludes that there is nothing in the facts in the case to justify consideration of the issue, after recognizing that several sister circuits have done so, and that dicta in other Fifth Circuit cases indicates that it would do so. We therefore have one Fifth Circuit panel recognizing at least tentatively such a defense and another fifth Circuit panel holding that this Court has explicitly rejected such a defense.

Having demonstrated that the Fifth Circuit opinion conflicts with an opinion of this Court and also with another panel opinion of the Fifth Circuit, it is urged that it also

conflicts with the opinion of the United States Court of Appeals for the third circuit in the case of *United States v. Twigg*, 588 F.2d 373 (1978). In *Twigg*, supra, the Third Circuit Court of Appeals held that, under a fact situation not so outrageous as the one involved in the instant case, the outrageous conduct of the agents of the government violated constitutional due process and that prosecution of the defendants was precluded by the conduct of the government.

While it is true that this Court has not addressed the question here presented in a definitive manner, it has, in dicta, indicated that it would do so in a proper case, and it is submitted that the instant case has produced the ripening of the issue.

Completely apart from the conflict between the circuit courts of appeal and this Court, if the opinion in the instant case is allowed to stand, it means that the government may send its "agents provocateurs" into the community with irresistible blandishments offerred to encourage citizens to agree to violate the law. A precedent authorizing government agents to create criminal situations out of the whole cloth simply to ensnare citizens whom they could not manage to put in jail in any other fashion is intolerable in a free society and this Honorable Court should draw the line here and now.

Finally, it is interesting to note that, from the record, it does not appear that the government had previous illicit dealings with Petitioners, or that they had specific information as to their desire to engage in unlawful activity or indeed anything to justify an interest by the government in these citizens.

2. Certiorari should be granted because the Fifth Circuit

opinion is in conflict with opinions of this Court and with other Fifth Circuit opinions and an important question of constitutional law is presented. The Fifth Circuit now essentially holds that the threshhold for effective waiver of a Sixth Amendment right to conflict free counsel is substantially lower than that required for waiver of other constitutional rights and also lower than that required by this Court for a waiver of any constitutional right.

The Fifth Circuit opinion cites *Cuyler v. Sullivan*, 100 S.Ct. 1708 (1980) for the proposition that a defendant must demonstrate a violation of an unwaived Sixth Amendment right to counsel by showing that "an actual conflict of interest adversely affected his (attorney's) performance." At first blush this might seem to require that there was some burden upon a defendant to establish something beyond the basic conflict of interest before he would be entitled to relief. This Court stated in *Cuyler* (p. 1719, hdnte 20, 21):

> Once the Court concluded that Glasser's lawyer had an actual conflict of interest it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The *conflict itself* demonstrated a denial of "the right to have the effective assistance of counsel."
> (emphasis supplied).

Thus, *Cuyler*, far from requiring a showing of actual prejudice, clearly holds that once an actual conflict exists, a Sixth Amendment right has been denied.

Further, the panel opinion of the Fifth Circuit in the instant case, if it indeed holds that something other than an actual conflict must be shown, fails to follow a statement of the law in an earlier Fifth Circuit panel opinion, *United*

States v. Risi, 603 F.2d 1193 (1979), which holds that an accused is deprived of his right to effective assistance of counsel even in the *absence of a showing of prejudice* (emphasis supplied) when there is an actual conflict of interest. That a showing of prejudice is not required was again stated by a Fifth Circuit panel opinion in *United States v. Alvarez*, 580 F.2d 1251 (1978). Further, in *United States v. Krazthor*, 614 F.2d 981 (1980), another panel opinion of the Fifth Circuit, we find a definition of an actual conflict of interest:

> actual conflict of interest exists when the defense attorney places himself in a situation inherently conducive to divided loyalty. The requisite conflict is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.

Thus, an examination of the foregoing authorities shows that an actual conflict of interest existed, by the Fifth Circuit's own definition, and that nothing further than that needs to be shown, according to this Court's opinion in *Cuyler*, supra, in order for relief to be granted *unless* Petitioners waived their Sixth Amendment right to conflict free counsel. Trial counsel testified that, in part, he refused to allow Petitioner Crossman to take the stand because he might have incriminated Petitioner Pierce.

With respect to the question of waiver, the conflict with opinions of this Honorable Court is less apparent since this specific question has not previously been raised. However, it is extremely important that this Court write on the matter since the standards for waiver now obtaining in the Fifth Circuit fail to meet the general standards for waiver of a constitutional right set out in *Johnson v. Zerbst*, 304 U.S.

458 (1938) and *Brady v. United States,* 397 U.S. 742 (1970). To demonstrate that this is so, this Honorable Court's attention is directed to *United States v. Garcia,* 517 F.2d 272 (1975). In that case the Fifth Circuit, citing the general requirements for waiver in *Johnson* and *Brady*, supra, isolated six quite specific actions which a trial court must take before an effective waiver of a Sixth Amendment right to conflict free counsel may be effectuated. The Fifth Circuit panel in the instant case again failed to adhere to precedent in its own circuit in holding that Petitioners' waiver of conflict free counsel was effective.

The assertion by the Fifth Circuit panel opinion in the instant case that the district judge "very carefully" addresses the question of waiver in chambers simply is not so. An examination of the footnote to the opinion where the Court's inquiry is quoted indicates that a cursory, superficial examination was conducted by the judge, one which was obviously far, far less than that required in *Garcia,* supra. The final sentence in the opinion demonstrates that the Fifth Circuit panel misses the relevant constitutional issue. There they state:

> Having been fully apprised of their right to separate counsel and the possibility of conflicts, they cannot now argue that they did not know.

Petitioners here have never urged that they were not aware of their right to separate counsel and the possibility of a conflict. What has instead been strongly urged is that knowing of the existence of a constitutional right and effectively waiving it are two quite different things. Petitioners only point continues to be that there was never an effective waiver under the guidelines set out by this Court and indeed by prior decisions of the Fifth Circuit.

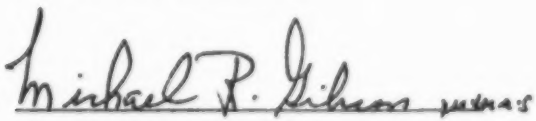
Petitioners relied heavily on *Garcia* on the original appeal and now complain that the Fifth Circuit panel opinion did not deal with, distinguish, overrule or otherwise treat the law in *Garcia,* but simply ignored it in order to affirm.

Petitioners strongly urge that it is extremely important to members of the bench and bar that a stable rule for waiver of conflict free counsel be laid down, since the various panels of the Fifth Circuit Court of Appeals apparently are unable to achieve that goal.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that a writ of certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Fifth Circuit in the case of United States of America v. Kenneth James Crossman and Gerald Reed Pierce. In the event that the petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded for action by the Court of Appeals in accordance with the opinion of this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition was mailed to the Office of the United States Attorney for the Western District of Texas in San Antonio, Texas on the 2nd day of April, A.D., 1982.

Michael R. Gibson pro se

MICHAEL R. GIBSON

Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Kenneth James CROSSMAN and
Gerald Reed Pierce,
Defendants-Appellants.

No. 81–1120

Summary Calendar

United States Court of Appeals, Fifth Circuit.

Dec. 11, 1981.

Defendants were convicted in the United States District Court for the Western District of Texas at El Paso, Lucius Desha Bunton, III, J., of conspiracy to possess unregistered firearms. Defendants appealed. The Court of Appeals, Brown, Circuit Judge, held that:

(1) Government had only to show that defendants agreed to possess unregistered firearms and that one of two did overt act in furtherance, and testimony proving that one defendant agreed to buy and resell or take commission, whichever would prove more profitable, established overt act requirement; (2) Government was not required to prove that defendant agreed that arms were to be unregistered, but only that defendants bought the arms, knowing they were unregistered; (3) asserted "outrageous conduct" by Government did not afford defendants entrapment defense; and (4) in view of fact that district judge very carefully addressed question of joint representation, in chambers, and both defendants replied that they wanted to be represented by same attorney and signed statement acknowledging such fact, they would not thereafter be heard to argue that they did not know

possibility of conflict or of right to separate counsel.

Affirmed.

1. **Conspiracy key 47(3)**

In prosecution for conspiracy to possess unregistered firearms, Government had only to show that defendants agreed to possess unregistered firearms and that one of the two did overt act in furtherance, and testimony proving that one defendant agreed to buy and resell or take commission, whichever would prove more profitable, established overt act requirement. 18 U.S.C.A. §371; 26 U.S.C.A. §5861(d).

2. **Conspiracy key 47(3)**

In prosecution for conspiracy to possess unregistered firearms, Government was not required to prove that defendants, agreed that arms were to be unregistered, but only that defendants bought the arms, knowing they were unregistered. 18 U.S.C.A. §371; 26 U.S.C.A. §5861(d).

3. **Criminal Law key 37(4)**

Predisposition is key to issue of entrapment, and case at bar demonstrated predisposition to commit crime of conspiracy to possess unregistered firearms. 18 U.S.C.A. §371; 26 U.S.C.A. §5861(d).

4. **Criminal Law key 37(1)**

Asserted "outrageous conduct" by Government did not afford defendants an entrapment defense.

5. **Criminal Law Key 37(1)**

Defense of entrapment is not available unless defendant admits facts upon which prosecution is based.

6. Internal Revenue key 4311, 5317

Firearms statutes equally prohibit transfer of unregistered firearms and transferee's taking possession prior to registration, and requested jury instruction that burden of registration of firearms falls upon transferor rather than transferee was properly refused. 26 U.S. C.A. §5861(d).

7. Criminal Law key 641.5

Fact that defendant later regrets following his attorney's advice does not furnish grounds for relief under Sixth Amendment, and defendant must in some way be prejudiced by the joint representation. U.S.C.A. Const. Amend. 6.

8. Criminal Law key 1137(8)

In view of fact that district judge very carefully addressed question of joint representation, in chambers, and both defendants replied that they wanted to be represented by same attorney and signed statement acknowledging such fact, they would not thereafter be heard to argue that they did not know possibility of conflicts or of right to separate counsel. U.S.C.A. Const. Amend. 6.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Appellants Kenneth James Crossman and Gerald Reed Pierce each appeal from their convictions on one count of conspiracy to possess unregistered firearms, 18 U.S.C.A. §

371 and 26 U.S.C.A. §5861(d). Finding no merit in any of their claims of error, we affirm.

Facts

On September 10, 1980, in Albuquerque, New Mexico, appellant Crossman was introduced by an informer to Benito Maestas, an undercover agent of the Drug Enforcement Agency who was posing as a gun dealer. Crossman previously had shown interest in purchasing automatic weapons to sell to the Nationals in El Salvador. During a recorded conversation, 1/ Crossman bragged to Maestas that his Salvadoran contact in El Paso, Texas had two $500,000 cashier's checks earmarked for the purchase of weapons.

In a series of meetings and telephone conversations, some in El Paso and some in Albuquerque, Maestas and Crossman engaged in lengthy and detailed negotiations as to the prices and types of weapons available. Crossman expressed concern that the weapons could be traced, but Maestas reassured him that they could be traced only to the original owner and no further.

Crossman also indicated that he wanted to make a profit on the deal. Maestas suggested that he might either buy and resell the guns or take a commission on the sale, whichever proved more lucrative. Crossman readily assented. He also stated that he had a "buddy", who proved to be appellant Pierce, who would have to be "cut in" on the transaction.

Crossman later met Maestas in Albuquerque and gave him a piece of paper containing the number and figures on the weapons he wanted: 13 cases of AR–15's, 2 cases

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1/ Almost all of the conversations between Crossman, Maestas and Hopgood, another DEA agent, were recorded. The tapes were identified and played at trial and the transcripts appear in the record.

of grease guns, 100 sticks of dynamite, and 1 case of hand grenades. The men again discussed prices and ended the meeting with an agreement to keep in contact.

Several days later, Maestas telephoned Crossman and told him that he could complete the deal in a few days. Before concluding the call, they discussed types of weapons and specifications.

Crossman tried unsuccessfully to reach Maestas the next day. When Maestas called him back, Crossman said his clients wanted to take delivery in two days, preferably in the daytime, and that he would go to El Paso to arrange for delivery. He gave Maestas a number where he could be reached.

After some delays, Maestas called Crossman in El Paso to give him the telephone number of his "partner" in the deal, "Al", actually Agent George Hopgood of the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury. "Al", Maestas told Crossman, knew about the deal and could give specifics as to what merchandise was available.

Hopgood met with Crossman in Crossman's motel room but appeared reluctant to deal with an unknown. Crossman eagerly offered to name references in Las Vegas, Albuquerque and Boston, if that would help, and said he trusted his El Paso contacts, with whom he had worked for seven years on drug deals and other things. He stressed his clients' immediate needs and pleaded for speed.

Hopgood emphasized that the guns were stolen. He further told Crossman that the prices Maestas had quoted were too low and asked about the arms' destination, stating that he would only deliver in El Paso and that Crossman would have to arrange further delivery. After some negotiating, Hopgood finally agreed to carry out the deal the next after-

noon.

The next morning, a series of telephone conversations ensued. Hopgood told Crossman what weapons were available and offered to meet. Crossman said he would get his man and that the "loot" was being made ready. Hopgood gave appellant Pierce the location of the merchandise. When Crossman and Pierce arrived, undercover agent Jimmy Searls, posing as another "partner", showed them the weapons.

That afternoon, Hopgood met with Crossman and Pierce back at Crossman's motel room. The two men expressed concern that the guns were not new. Hopgood offered an explanation which evidently appeased his two clients. Pierce then handed him $5,000 to purchase 25 of the guns. They arranged to meet in the parking lot to make the transfer. After the delivery, Pierce opened the trunk of his car to load the arms inside, agents closed in and arrested both men.

Crossman and Pierce were convicted of conspiracy to possess unregistered firearms as prohibited by 18 U.S.C.A. §371 [2] and 26 U.S.C.A. §5861(d) [3] Both men appeal,

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2/ Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3/ Prohibited acts

It shall be unlawful for any person—

and raise four issues.

Sufficiency of the Evidence

First, Crossman and Pierce contend that the evidence was insufficient to sustain a finding of conspiracy. In reviewing the sufficiency of the evidence, we must view it in the light most favorable to the government and then ask whether reasonable minds could conclude that the evidence is consistent with any reasonable hypothesis of innocence. *U. S. v. Vincent*, 648 F.2d 1046, 1048 (5th Cir. 1981); *Glasser v. U.S.*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L. Ed. 680, 704 (1942). The answer, clearly, is no. The facts create a granite foundation to support the conviction.

[1] Crossman contends that he was a mere go-between or broker and that the evidence failed to establish an agreement with Pierce. Under the statute, the government had only to show that Crossman and Pierce agreed to possess unregistered firearms and that one of the two did an overt act in furtherance of the agreement. One could properly infer an agreement from Pierce's conduct as established in the record. Maestas' testimony proved that Crossman agreed to buy and resell or take a commission, whichever would prove more profitable. His actions fulfilled the overt act requirement, *see U.S. v. Alvarez*, 610 F.2d 1250, 1255 n. 5 (5th Cir. 1980), *cert denied*, _____ U. S. _____, 101 S. Ct. 2017, 68 L. Ed. 2d 324 (1981).

[2] Crossman and Pierce say that the government had to prove that they agreed that the arms were to be unregistered.

3/ Continued

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record. . . .

This argument is incorrect. All the government had to prove, which it did, was that appellants bought the arms, knowing they unregistered. *See U. S. v. Vasquez,* 476 F.2d 730, (5th Cir.), *cert denied,* 414 U.S. 836, 94 S.Ct. 181, 38 L.Ed.2d 72 (1973). This finding also rests on sufficient support in the record.

Entrapment

For the first time on appeal, Crossman and Pierce urge an entrapment defense, claiming that the government's agents ensnared them. Even though they did not raise or present evidence on this point at trial and did not object to the District Judge's failure to instruct the jury about entrapment, appellants suggest that in presenting its side, the government somehow made out a prima facie case of entrapment that it then bore the burden of disproving. Whatever agent Maestas' level of involvement, we are certain that it did not demonstrate such unwarranted government action as mystically to constitute a prima facie case on entrapment.

[3] Predisposition is the key to this issue. Entrapment "is a relatively limited defense . . . rooted. . . in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government." *U.S. v. Russell,* 411 U.S. 423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366, 375 (1973), *citing Sorrels v. U.S.* 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). Here the record completely undercuts appellants' claim and fully demonstrates their predisposition to commit the crime of which they were convicted.

[4] Crossman and Pierce also assert that "outrageous conduct" by the government should afford them the entrapment defense. Even if the government's actions rose to such a level, the Supreme Court in *Russell* considered and explicit-

ly rejected this argument. 411 U.S. at 433–434, 93 S.Ct. at 1643–44, 36 L.Ed.2d at 374–75.

[5] We point out, moreover, that in this Circuit the defense of entrapment is unavailable unless the defendant admits the facts upon which presecution is based. *U.S. v. Webster*, 649 F.2d 346, 351, n. 10 (5th Cir. 1981) (en banc); *U.S. v. Greenfield*, 554 F.2d 179, 181 (5th Cir. 1977), *cert denied* 439 U.S. 860, 99 S.Ct. 178, 58 L.Ed.2d 168 (1978). Since appellants, relying on the commission broker theory, in effect deny those facts, they are not entitled to raise the defense of entrapment.

Jury Instructions

[6] Crossman and Pierce challenge the court's failure to give a requested jury instruction concerning registration requirements for firearms. They sought an instruction that the burden of registration of firearms falls upon the transferor rather than the transferee. Although factually correct, that instruction omits the equally important prohibition against a transferee's taking possession prior to registration. It is not error to refuse to give an instruction that incorrectly states the law. As the jury could conclude that Crossman and Pierce knew full well these guns were not registered, their taking possession violated the law irrespective of the burden of registration.

Dual Representation

[7] Finally, Crossman and Pierce maintain that the court should have granted a new trial based on their attorney's representation of both defendants. We disagree. Joint representation by itself offends no constitutional safeguard and does not establish a conflict of interest. "The actual conflict must be demonstrated; mere speculation based on joint representation is not sufficient." *U.S. v. Risi*, 603 F.2d

1193, 1195 (5th Cir. 1979). The fact that a defendant later regrets following his attorney's advice does not furnish grounds for relief under the Sixth Amendment. The defendant "must in some way be prejudiced by the joint representation." *U.S. v. Krazthor,* 614 F.2d 981, 983 (5th Cir. 1980).

In *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the Supreme Court emphasized that the right to a new trial for violation of the Sixth Amendment right to counsel exists only in instances where a defendant can demonstrate that "an actual conflict of interest adversely affected his [attorney's] performance." 446 U.S. at 348, 100 S.Ct. at 1718, 64 L.Ed.2d at 346. Defendants' new counsel has only made vague assertions that he would have pursued a different trial strategy, possibly putting Crossman on the witness stand. 4/ There simply is no evidence, and defendants point to none, which shows that counsel sacrificed the rights of one defendant for those of another. Without more, we believe defendants have failed to bring themselves within the orbit of *Cuyler, Risi* and *Kranzthor.*

[8] The District Judge very carefully addressed this question in chambers. He asked the defendants if they understood the potential for conflict and still wished to be represented by the same attorney. They both replied they did. 5/

4/ Indeed, there is much question whether counsel would actually have put Mr. Crossman on the witness stand, since any statement he had made tending to exculpate Pierce would likely have incriminated himself. Such actions, in fact, would have provided the very same adverse effect which the appellants assert occurred in the trial below.

5/ In Chambers, the Judge raised this problem and preserved it on the record:

THE COURT: Let the record reflect that Mr.

He had them sign a statement acknowledging this fact. Defendants may not have their cake and eat it too. Having

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5/ Continued

Crossman and Mr. Pierce are here along with Mr. McDonald and Mr. Ramos and the reason I called you back here, Mr. Crossman and Mr. Pierce, is because both of you are represented by the same lawyer and under our rules we have the right to try you together and you, of course, have the right to have just one lawyer, but it may develop sometime during the course of the trial one of you may have a defense and the other one may not have a defense as to a particular matter, and there may be a conflict of interest insofar as Mr. Ramos is concerned.

Now, I need to know from you whether you have addressed this possible conflict with Mr. Ramos. I have no idea what the case is about, and may be the same identical deal as to both of you, but I do need to know since you are represented by the same lawyer that you have gone over this with your lawyer and that you do, both of you, wish Mr. Ramos to represent you in this matter.

MR. CROSSMAN: Yes, sir.

MR. PIERCE: Yes, sir.

THE COURT: I am not trying to embarass Mr. Ramos, it is just something I am trying to cover my shirttail with, you understand

And because if it developed that one of you may have a Fifth Amendment or Sixth Amendment or Seventh, whatever right that develops during the trial and the other one of you didn't, it might create problems for Mr. Ramos. He can't ride two horses at the same time.

And have you executed, Mr. Ramos, one of those waivers, you know, the deal where you are representing two Defendants?

MR. RAMOS: No, Your Honor, I haven't.

THE COURT: Look it over. I am getting copies of the form. Look it over, Since I know nothing about your case, just look it over and if it is agreeable with

been fully apprised of their right to separate counsel and the possibility of conflicts, they cannot now argue that they did not know.

AFFIRMED.

5/ continued
you I would like you to sign one and put it in the record.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81–1120

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KENNETH JAMES CROSSMAN and
GERALD REED PIERCE,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas

Filed March 16, 1982

ORDER:

The motion of appellants for X stay [] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

[x] The motion of appellant for x stay [] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including April2, 1982, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expira-

tion of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the s me conditions as set forth in the preceding paragraph.

The motion of_____ for a further stay of the issuance of the mandate is DENIED.

/s/ JOHN R. BROWN
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81–1120

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KENNETH JAMES CROSSMAN and
GERALD REED PEIRCE,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 11, 1981, 5 Cir., 1982, _____ F.2d _____).

(February 25, 1982)

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

X The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOHN R. BROWN
United States Circuit Judge

Clerk Note:
See Rule 41 FRAP and Local Rule 17
for Stay of the Mandate

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81–1120

SUMMARY CALENDAR

D.C. Docket No. EP–80–CR–143

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KENNETH JAMES CROSSMAN and
GERALD REED PIERCE,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.
December 11, 1981
ISSUED AS MANDATE: